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IN THE

Supreme Court of the United States

October Term, 1953
No. 449

UNITED STATES OF AMERICA,

Petitioner,

vs.

MEAD GILMAN, JR.,

Respondent.

Brief of Respondent Mead Gilman, Jr., in Opposition to Petition for Writ of Certiorari.

NO REASON EXISTS FOR GRANTING THE WRIT.

The Decision of the Court of Appeal Is in Accordance With Congressional Intent as Demonstrated by the Statute.

Prior to the enactment of the Federal Tort Claims Act the United States had no right of indemnification from a negligent employee, since the United States was not itself liable. When the Tort Claims Act was enacted Section 2676 of Title 28, U. S. C., provided:

> "The judgment in an action under Section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

Section 2672 of the same title, with respect to administrative settlements under the Act with a claim of $1000 or less, provides that:

> "The acceptance by the claimant of any such award, compromise or settlement, shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim by reason of the same subject matter."

Senate Report 1196, 77th Cong., 2d Sess., p. 5, dealing with the corresponding provisions of what is now Section 2672 of Title 28 *(supra)*, contains the following statement:

> " 'It is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone within limits, leaving the employee at fault to be dealt with under the usual disciplinary controls.' "

The learned Court of Appeals in commenting upon this report states as follows, in footnote 3 of its decision:

> "This report was made in 1942. While in footnote 8 to United States v. Yellow Cab Co., *supra*, some question is raised as to the force of the 1942 legislative history in construing a 1946 Act, yet Dalehite v. United States, 346 U. S. 15, 73 S. Ct. 956, makes it plain that Congress, in passing the Act in 1946, relied upon the 1942 reports and testimony, and the Court there quotes extensively from them including the testimony of then Assistant Attorney General Shea. At that time Mr. Shea testified: 'If the Government has satisfied a claim which is made on account of collision between a truck

carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by a judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. * * * The Chairman. Mr. Shea, you are discussing and directing your remarks to the matter where, if a person is injured and files a claim against the Government and the Government satisfies that claim, that is the end of the claim against anybody? Mr. Shea. That is right. The Chairman. What is the arrangement when the Government has an employee who is guilty of gross negligence and injury results? Is there any requirement that that employee should in any way respond to the Government if it has to pay for the injury in the event of gross negligence? Mr. Shea. Not if he is a Government employee. Under those circumstances, the remedy is to fire the employee. Mr. Laughlin. No right of subrogation is set up? Mr. Shea. Not against the employee.' (Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2nd Sess., on H. R. 5373 and 6463, pp. 9, 10.)"

The Government's Petition at page 12, footnote 6, concedes that:

"In testifying in the House committee on this aspect of the bill in the 77th Congress, a representative of the Department of Justice suggested that, in his view, the Government would have no right of indemnity and would be left to its remedy of firing the negligent employee or taking other disciplinary action. See Hearings, *supra*, at p. 10. This suggestion also appeared in S. Rept. No. 1196, 77th Cong., 2d Sess., p. 5. However, this testimony was

> given without reference to the situation of insured employees (see fn. 3, *supra*, pp. 6-7) and was not rested on any prohibition or provision in the Act."

It therefore must be apparent that when the Tort Claims Act was enacted Congress in subjecting the Government to a liability which it had never before had, did not have the slightest intention of allowing the Government to seek recompense from the employee.

The question of whether any certain employee might or might not carry insurance or any policy on the part of the Government of seeking indemnity only from insured employees as intimated at page 6 of the Government's Petition, footnote 3, would be immaterial. Congress never intended that the employee would have to respond to the Government. If Congressional intent were ignored the employee would be forced to carry insurance based upon premiums large enough to cover verdicts rendered against such a prime target as the United States Government. If Congress had intended such a burden upon the employee it would have specifically so provided in the Act for indemnification instead of placing in the Act a provision discharging the employee from any liability when judgment was entered against the Government.

The Court of Appeals found it unnecessary to determine whether the rationale of *United States v. Standard Oil Co.*, 332 U. S. 301, would be applicable herein. There the Government was refused indemnification for hospital expenses and loss of services resulting because of defendant's negligent injury to a soldier. Under the state law a right of action would have accrued to a master for similar injuries to a servant. The court refused to concede

such right to the Government, stating among other things, that the subject concerned the "purse strings" of the Government and Congress could have taken positive steps to declare its wishes. Such is the case here.

When the State of California by Section 400 of the Vehicle Code waived its sovereign immunity from claims resulting from negligent operation of vehicles by State employees, specific provision was made for subrogation of the State against the employee as follows:

> "The state * * * is responsible to every person who sustains any damage by reason of death, or injury to person or property as the result of the negligent operation of any said motor vehicle by an officer, agent or employee * * * when acting within the scope of his office, agency or employment; and such person may sue the state * * * in any court of competent jurisdiction in this state in the manner directed by law * * *. In every case where recovery is had under the provisions of this section against the state * * * then the state * * * shall be subrogated to all of the rights of the person injured, against the officer, agent or employee, as the case may be, and may recover from such officer, agent or employee, the total amount of any judgment and cost recovered against the state * * * together with costs therein."

Had the Congress of the United States intended to claim such a right, the Tort Claims Act would also have so provided.

Nothing decided in *United States v. Yellow Cab Company*, 340 U. S. 543, wherein it was held that the Tort Claims Act waived the Government's sovereign immunity to the extent of permitting a joint tort feasor to implead

the United States as a third party defendant for the purpose of recovering contribution from it, remotely bears on the present issue. In that case there was no issue concerning the right of the Government to recover from its employees damages for liability resulting under the Tort Claims Act. Any reference therein contained to that subject matter was pure dicta set forth without benefit of detailed analysis of legislative intent and in connection with a situation not involving any possible application of Section 2676 of Title 28, which acts as a discharge of an employee when a judgment is rendered against the Government.

The Decision of the Court of Appeals Is a Sound Declaration of Proper Law.

The Government concedes that its cause of action is quasi-contractual and based upon the doctrine of unjust enrichment (Pet. p. 16) and in its brief to the Court of Appeals (p. 7) states:

> "The action for indemnity is quasi-contractual in theory, its rationale being that the defendant is unjustly enriched by the plaintiff's payment of the injured party's claim. (Citations.)"

The provisions of Section 2676 that a judgment against the Government constitutes a "complete bar" to any action by the claimant against the employee must be read in connection with Section 2672 of the same Title dealing with administrative settlements of claims under the Act and providing that settlement of a claim of $1000 or less

"shall constitute a complete release of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim * * *." It therefore follows that these provisions of the Tort Claims Act read together lead to the inescapable conclusion that Congress intended a judgment against the Government or an administrative settlement as provided in the Act to release and discharge the employee from all liability. Thus when judgment is rendered against the United States the employee's primary liability is gone. Any liability is discharged and disappears and there is no foundation for the Government to claim unjust enrichment, for Congress has provided otherwise. At the time of the judgment the primary liability of the employee is wiped out and there is only one liability, that of the Government.

Petitioner, at page 14 of its brief, has failed to set forth fully comment "c" of Restatement, *Restitution, Section 78,* as it may apply to the case at bar, and we set it forth herein:

> "A person who has become secondarily liable under a transaction * * * because of the fault of another is entitled to restitution from the other if he performs a duty owed by him to the creditor (*i.e.*, the injured person), even though before such performance the duty of the other has terminated. The duty of reimbursement arises from the payment even if the payor kept alive the duty against himself by making promises to pay, obtaining extensions or changing the state of his residence."

This rule has been followed in cases cited by petitioner at page 15 of its brief wherein indemnity is allowed the employer after the statute of limitations has run in favor of the employee against a third party. The recovery is allowed by reasoning that the primary debt of the employee still exists although unenforceable by the third party because of the statute of limitations. This would not prevent the employer, who was secondarily liable and has satisfied his obligation, from recouping from the one primarily liable if, under the peculiar factual situation, the statute of limitations does not bar such action. Such reasoning can have no application to the present case because by the obvious intent of the statutory enactment the judgment against the Government is a discharge of the employee in recognition of the financial solvency of the United States, and neither a primary liability nor any liability on the part of the employee thereafter exists.

The other cases referred to at page 15 of petitioner's brief allow the employer to seek indemnification from his employee for damages resulting to the employer by virtue of injuries inflicted by the employee on his own wife in the course of his employment. Such recovery is allowed, although the wife could not have sued her husband directly. But here again we are not dealing with a statutory discharge but with a "common-law immunity" of the husband from suit by the wife. The wrong of the husband to the wife has never been discharged but simply may not be the subject of action because as a matter of public policy this would promote family discord. The

primary liability of the husband still exists and if the employer is required to respond in damages based on his secondary liability, the courts have allowed him to recover from the employee. Such a recovery would not be possible had the State Legislature provided in effect, as in the case at bar, that any recovery against the employer discharged the employee.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

PARKER, STANBURY, REESE & MCGEE,
WM. C. WETHERBEE,
ROLLAND LEE NUTT,
Attorneys for Respondent.